

SUPREME COURT U. S.  
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**In the Supreme Court of the United States**

OCTOBER TERM, 1976

No. 76-1793

STEVEN CHARLES SANDERS,  
*Petitioner,*

vs.

STATE OF KANSAS,  
*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE  
SUPREME COURT OF THE STATE OF KANSAS

**MEMORANDUM FOR THE STATE OF KANSAS  
IN OPPOSITION**

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**MEMORANDUM FOR THE STATE OF KANSAS  
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The petitioner seeks United States Supreme Court review of a decision of the Supreme Court of the State of Kansas affirming the petitioner's conviction for the crime of possession of marijuana with intent to sell, in violation of Kansas Statutes Annotated 65-4127(b).

Petitioner alleges his constitutional rights under the Fourth Amendment were violated in two respects. First, he alleges the affidavit which formed the basis for a search warrant was not based on probable cause. Secondly, he alleges because there was an error on the affi-



davit he is entitled *ipso facto* to have evidence seized pursuant to the search warrant suppressed. Additionally, petitioner alleges he should have been allowed to go beyond the face of the affidavit and present evidence challenging the probable cause for issuance of the search warrant. (See Petition, pp. 2-4).

Petitioner characterizes the error on the affidavit as an intentional false misrepresentation of a material fact throughout his petition for a writ of certiorari. The respondent takes issue with this characterization and believes the record supports the view that a typographical error has been blown out of proportion. (See opinion of Kansas Supreme Court in petition, pp. A12-A13). The affidavit for the search warrant indicates the affiant police officer knew the confidential informant for "several months" when, in fact, he had known the confidential informant for "several weeks". This is the error on the affidavit.

Prior to the preliminary hearing in the matter, the petitioner was allowed by the examining magistrate, over the objection of the prosecution, to delve into the factual basis of the warrant. An evidentiary hearing was conducted and the affiant law enforcement officer was thoroughly examined regarding this matter. The petitioner's motion for suppression was denied. Later, a second motion to suppress the evidence was held in the District Court. The District Court judge reviewed the transcript of the earlier motion in the Magistrate Court, including the testimony of the affiant. Again, the motion was denied. The petitioner was convicted and appealed to the Kansas Supreme Court, where the issue of the search was again raised. The Kansas Supreme Court found that there was no illegality in the search and affirmed petitioner's conviction.

Respondent is aware the United States Supreme Court has not directly ruled on whether a criminal defendant may challenge the factual averments in an affidavit in support of a search warrant or go beyond the affidavit. *Rugendorf v. United States*, 376 U.S. 528, 11 L. Ed. 2d 887, 34 S.Ct. 825. The overwhelming majority of cases decided in state courts, absent an applicable statute, support the position that matters recited in an affidavit for a search warrant may not be attacked or questioned by the party against whom the search warrant is directed. (See Annotation, Search Warrants: Disputing Matters Stated in Supporting Affidavit, 5 A.L.R. 2d 394 at 396.) This issue has been presented to the United States Supreme Court for review at least once before and certiorari was denied. *Tucker v. Maryland*, 244 Md. 488, 224 A. 2d 111, cert. denied 386 U.S. 1024, 87 S.Ct. 1381 (1967).

Supreme Court Rule 19 regarding considerations governing review on certiorari provides that the court's judicial discretion will be invoked only where there are special and important reasons therefor. Respondent is of the opinion the instant matter is not the proper case for the Supreme Court to issue an opinion concerning the challenging of factual averments contained in an affidavit in support of a search warrant. As stated, *supra*, the petitioner in this matter was granted an evidentiary hearing and two trial level judges in addition to the Kansas Supreme Court ruled that probable cause existed for issuance of the search warrant.

Finally, respondent cites the recent case of *Stone v. Powell*, ..... U.S. ...., 96 S.Ct. 3037, ..... L. Ed. 2d ..... (1976), wherein it is held that where a state has provided a criminal defendant an opportunity for a full and fair litigation of Fourth Amendment claims he should not be granted *habeas corpus* relief in the Federal Court sys-

tem. While this, of course, is not a proceeding in *habeas corpus*, the same principle should apply. The petitioner had three opportunities to litigate the search and seizure involved in this case. At each stage of the proceedings the decisions went against him. There should be a finality to litigation and respondent respectfully requests the court to deny the petitioner's request for a writ of certiorari.

Respectfully submitted,

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